

PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Name NAWABI IDRIS
 (Last) (First) (Initial)

E-filing

Prisoner Number P-41591

Institutional Address AVENAL STATE PRISON, P.O. BOX 8,

1 KINGS WAY, AVENAL, CA 93204-0008

**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

IDRIS NAWABI
 (Enter the full name of plaintiff in this action.)

vs.

J. HARTELY, WARDEN.

(Enter the full name of respondent(s) or jailor in this action)

Case No. 08
 (To be provided by the clerk of court)

**PETITION FOR A WRIT
 OF HABEAS CORPUS**

Read Comments Carefully Before Filling In

When and Where to File

You should file in the Northern District if you were convicted and sentenced in one of these counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in this district if you are challenging the manner in which your sentence is being executed, such as loss of good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

If you are challenging your conviction or sentence and you were not convicted and sentenced in one of the above-named fifteen counties, your petition will likely be transferred to the United States District Court for the district in which the state court that convicted and sentenced you is located. If you are challenging the execution of your sentence and you are not in prison in one of these counties, your petition will likely be transferred to the district court for the district that includes the institution where you are confined. Habeas L.R. 2254-3(b).

Who to Name as Respondent

You must name the person in whose actual custody you are. This usually means the Warden or jailor. Do not name the State of California, a city, a county or the superior court of the county in which you are imprisoned or by whom you were convicted and sentenced. These are not proper respondents.

If you are not presently in custody pursuant to the state judgment against which you seek relief but may be subject to such custody in the future (e.g., detainees), you must name the person in whose custody you are now and the Attorney General of the state in which the judgment you seek to attack was entered.

A. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE

1. What sentence are you challenging in this petition?

- (a) Name and location of court that imposed sentence (for example, Alameda County Superior Court, Oakland):

Alameda County Superior Court, Oakland

Court

Location

- (b) Case number, if known H23388

- (c) Date and terms of sentence April 02, 1999

- (d) Are you now in custody serving this term? (Custody means being in jail, on parole or probation, etc.) Yes ☒ No ☐

Where?

Name of Institution: Avenal State Prison

Address: P.O. Box 8, 1 Kings Way, Avenal, CA 93204

2. For what crime were you given this sentence? (If your petition challenges a sentence for more than one crime, list each crime separately using Penal Code numbers if known. If you are challenging more than one sentence, you should file a different petition for each sentence.)

P.C. 289, P.C. 286(c)(3), P.C. 211, 12022.3(a) and 12022(b).

3. Did you have any of the following?

Arraignment: Yes ☒ No ☐

Preliminary Hearing: Yes ☒ No ☐

Motion to Suppress: Yes ☒ No ☐

4. How did you plead?

Guilty ☐ Not Guilty ☐ Nolo Contendere ☒

Any other plea (specify) _____

5. If you went to trial, what kind of trial did you have?

Jury ☐ Judge alone ☒ Judge alone on a transcript ☐

6. Did you testify at your trial? Yes ☐ No ☒

7. Did you have an attorney at the following proceedings:

(a) Arraignment Yes ☒ No ☐

(b) Preliminary hearing Yes ☒ No ☐

(c) Time of plea Yes ☒ No ☐

(d) Trial Yes ☐ No ☒

(e) Sentencing Yes ☒ No ☐

(f) Appeal Yes ☐ No ☒

(g) Other post-conviction proceeding Yes ☒ No ☐

8. Did you appeal your conviction? Yes ☐ No ☒

(a) If you did, to what court(s) did you appeal?

Court of Appeal Yes ☐ No ☒

Year: _____ Result: _____

Supreme Court of California Yes ☐ No ☒

Year: _____ Result: _____

Any other court Yes ☐ No ☒

Year: _____ Result: _____

(b) If you appealed, were the grounds the same as those that you are raising in this

petition? Yes _____ No ☒

(c) Was there an opinion? Yes _____ No ☒

(d) Did you seek permission to file a late appeal under Rule 31(a)?

Yes _____ No ☒

If you did, give the name of the court and the result:

9. Other than appeals, have you previously filed any petitions, applications or motions with respect to this conviction in any court, state or federal? Yes ☒ No _____

[Note: If you previously filed a petition for a writ of habeas corpus in federal court that challenged the same conviction you are challenging now and if that petition was denied or dismissed with prejudice, you must first file a motion in the United States Court of Appeals for the Ninth Circuit for an order authorizing the district court to consider this petition. You may not file a second or subsequent federal habeas petition without first obtaining such an order from the Ninth Circuit. 28

U.S.C. §§ 2244(b).]

(a) If you sought relief in any proceeding other than an appeal, answer the following questions for each proceeding. Attach extra paper if you need more space.

1. Name of Court: Superior Court of Alameda County

Type of Proceeding: The Petition for writ of Habeas Corpus

Grounds raised (Be brief but specific):

a. That Juries, not Judges must determine facts that justify the upper term.

b. The upper term imposed by the Judge is unconstitutional.

c. The upper term imposed by the Judge violated petitioner's Sixth Fourth Amendment rights.

Result: Denied Date of Result: March 28, 2007

II. Name of Court: First District State Court of Appeal

Type of Proceeding: Habeas Corpus Petition

Grounds raised (Be brief but specific):

In Apprendi the statutory maximum sentence is the
 a. ~~middle term not the maximum the Legislature had authorized.~~
 b. ~~The judge used the preponderance standard not the~~
~~beyond a reasonable doubt standard which the jury applies.~~
 c. California Determinate Sentence Law is unconstitutional
to the extent that it allows the judges to impose an upper-term.

Result: Denied Date of Result: OCT 30, 2007

III. Name of Court: Supreme Court of California

Type of Proceeding: Habeas Corpus Petition

Grounds raised (Be brief but specific):

a. The rule in Cunningham qualifies under the watershed/backstop test.
 b. The judge imposed an upper-term sentence on the basis
~~of sentencing factors that the jury has not determined~~
~~beyond a reasonable doubt.~~
 c. The rule in Apprendi/Blakely/Cunningham announced
elements essential to fairness of a criminal proceeding.
 d. Cunningham rule is change in criminal proceeding.

Result: Denied / (See Attached Order) Date of Result: JAN. 16, 2008

IV. Name of Court: _____

Type of Proceeding: _____

Grounds raised (Be brief but specific):

a. _____

b. _____

c. _____

d. _____

Result: _____ Date of Result: _____

(b) Is any petition, appeal or other post-conviction proceeding now pending in any court?

Yes _____ No ☒

Name and location of court: _____

B. GROUNDS FOR RELIEF

State briefly every reason that you believe you are being confined unlawfully. Give facts to support each claim. For example, what legal right or privilege were you denied? What happened? Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you

need more space. Answer the same questions for each claim.

[Note: You must present ALL your claims in your first federal habeas petition. Subsequent petitions may be dismissed without review on the merits. 28 U.S.C. §§ 2244(b); McCleskey v. Zant, 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).]

Claim One: The Trial Court erred and abused its discretion

when imposing the upper term violating petitioner's Sixth and (See Attached Continuance)

Supporting Facts: On April 02, 1999, petitioner entered a plea

of not guilty to sexual assault on an adult

(Penal Code § 261.5)(a)(1) and burglary of

the residence (Penal Code 214.1). (See Attached Continuance.)

Claim Two:

Supporting Facts:

Claim Three:

Supporting Facts:

If any of these grounds was not previously presented to any other court, state briefly which grounds were not presented and why.

1 GROUND ONE: (Continued from Page 6 of Petition For Writ
2 of Habeas Corpus):

3 Fourteenth Amendments and the rules announced in
4 Apprendi/Blakely/Cunningham that elements essential
5 to fairness of a proceeding and change in criminal
6 proceeding;

7
8
9 SUPPORTING FACTS: (Continued from Page 6 of Petition For
10 writ of Habeas Corpus):

11 Thereafter, the sentencing judge sentenced petitioner
12 to the upper term of 8 years on P.C. 289 plus a conse-
13 cutive enhancement of 4 years on P.C. 12022.3(a) for
14 use of a weapon and a consecutive of 6 years on P.C.
15 286(c)(3) and a consecutive of 1 year on P.C. 211 the
16 middle term one third plus a consecutive enhancem-
17 ent of 4 months for the use of a weapon, P.C. 12022(b).
18 Under the California's Determinate Sentencing Law (-
19 DSL), offenses are punishable by one of three precise
20 terms of imprisonment: a low term, a mid term, and
21 a upper term.

22 At the time of petitioner's sentencing, the sentenc-
23 ing judge imposed the upper term based on the judge's
24 fact-finding.

25 Thereafter, the United States Supreme Court had ruled
26 in Apprendi, that a trial court could only impose
27 the statutory maximum which is the mid-term
28 based on the judge's fact-finding.

1 Therefore the sentencing judge in petitioner's case
2 abused its discretion when imposing the upper-
3 term of 8 years.

4 Furthermore, petitioner's plea does not warrant the
5 upper-term because he is entitled to specific per-
6 formance based on the sentencing judge's impos-
7 ition of an invalid sentence which had more to
8 do with the cast of the rules set forth in Appr-
9 endi, and the only appropriate remedy is to vacate
10 the sentence, and remand the case back to the
11 Superior Court for re-sentencing as outlined in A-
12 ppendi and by the Sixth and Fourteenth Amendments.
13 Moreover, the fundamental principal at issue here
14 was announced in Apprendi, supra, 530 U.S. at p. 490:
15 "Other than the fact of a prior conviction, any fact
16 that increases the penalty for a crime beyond the
17 the prescribed statutory maximum must be subm-
18 itted to a jury and proved beyond a reasonable do-
19 ubt." The Supreme Court clarified the meaning
20 of the term "statutory maximum" in Blakely
21 v Washington 542 U.S. 296, 303-304, "the maximum
22 sentence a judge may impose solely on the basis
23 of the facts reflected in the jury verdict or admit-
24 ted by the defendant... In other words, the relevant
25 'statutory maximum' is not the maximum sentence
26 a judge may impose after finding additional facts,
27 but the maximum he may impose without any
28 additional findings. The sentencing judge exceeded

his proper authority in petitioner's case.

ARGUMENT

In Apprendi v New Jersey, 530 U.S. 466 (2000), the United States Supreme Court made it perfectly clear when referring to the "statutory maximum" sentence, that it did not mean the maximum the Legislature had authorized, but rather the maximum sentence that can be imposed based solely on the jury's findings. (see also Blakely v Washington, 542 U.S. 294 (2004) (constitutional explanation).

Petitioner's plea agreement alone limited the permissible sentence that the judge could impose, however, the additional factfinding by the sentencing judge yielded the upper-term of a eight years sentence, that was found by a preponderance of evidence that violated petitioner's rights safe-guarded by the Sixth and Fourteenth Amendments.

In concluding, the sentencing judge's factfinding in petitioner's case elevated his sentence from the statutory maximum of 6 years to 8 years... falls within the province of the jury employing a beyond a reasonable doubt standard, not the bailwick of a judge's determination where the preponderance of evidence lies. On the basis of retroactivity, petitioner is respectfully asking this court to consider in the burden of proof between the preponderance standard and the beyond a reasonable doubt standard the petitioner's case.

1 In closing argument, Apprendi/Blakely/Cunn-
2 ingham decisions was not a new rule, it
3 announced the fundamental fairness of
4 and accuracy of the criminal proceeding
5 by preventing an impermissibly large risk
6 of an inaccurate conviction. And it anno-
7 unced the fundamental elements essen-
8 tial to the fairness of a proceeding.

9
10
11 Executed on Feb. 26, 2008

Ed Nally
Signature of Petitioner

1 List, by name and citation only, any cases that you think are close factually to yours so that they
2 are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning
3 of these cases:

4 Apprendi v. New Jersey (2000) 530 U.S. 466, 490 (Apprendi), Blakely
5 v. Washington (2004) 542 U.S. 294, 296 (Blakely), and Cunningham
6 v. California (2007) 549 U.S. [127 S. Ct. 856].

7 Do you have an attorney for this petition?

Yes _____ No ☒

8 If you do, give the name and address of your attorney:
9 _____

10 WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in
11 this proceeding. I verify under penalty of perjury that the foregoing is true and correct.

12 Executed on FEB. 26, 2008

13 Date

14 Signature of Petitioner

STATE OF CALIFORNIA
GA-22 (9/22)

INMATE REQUEST FOR INTERVIEW

DEPARTMENT OF CORRECTIONS

DATE Feb. 14, 2008	TO TRUST OFFICE	FROM (LAST NAME) Nawab, Idris	CDCR NUMBER P41591
HOUSING G40	BED NUMBER 192	WORK ASSIGNMENT unassigned	JOB NUMBER
OTHER ASSIGNMENT (SCHOOL, THERAPY, ETC.)			FROM TO
			ASSIGNMENT HOURS
			FROM TO

Clearly state your reason for requesting this interview.

You will be called in for an interview in the near future if the matter cannot be handled by correspondence.

Dear Trust Account Officer,

I am currently filing a Federal Petition for Habeas Corpus and I don't have the \$5.00 filing fee so the court has required me ^{to} include copies of my trust account statement showing my balance, transactions for the last six

Do NOT write below this line. If more space is required, write on back.

INTERVIEWED BY

DATE

DISPOSITION

101

to see Review etc

S154884

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re IDRIS NAWABI on Habeas Corpus

The petition for writ of habeas corpus is denied.

SUPREME COURT
FILED

JAN 16 2008

Frederick K. Ohlrich Clerk

Deputy

GEORGE
Chief Justice

IDRIS NAWABI CDC# P.41591
AVENAL STATE PRISON
P.O. BOX 9/640-53L
AVENAL, CA 93204-0009

Confidential

AVENAL STATE PRISON

RECEIVED

MAR - 8 2008

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

U.S. DISTRICT COURT, NORTHERN
DISTRICT OF CALIFORNIA.
ATTN: OFFICE OF THE CLERK
450 GOLDEN GATE AVENUE, BOX 36060
SAN FRANCISCO, CA 94102

LEGAL MAIL

FEB 29 2008

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MAILROOM

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